Dr. J. B. S. Jackson

Parkman (with the author's regards)

THE

RELATIONS

OF THE

MEDICAL WITNESS

WITH

THE LAW AND THE LAWYER.

BY

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Read to the Boston Society for Medical Observation.

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THE summons to appear as a witness in a court of justice is generally received by medical practitioners with feelings of disinclination to comply, prompted, not solely by the trouble and loss of time which an attendance of this kind involves, and which would apply with equal effect to all classes of society who are called upon in this way to render their quota of support to the Institutions of the Law, but with feelings peculiar to themselves as a class, dependent upon the supposition that they are about to be subjected to an ordeal from which they can hardly expect to escape unscathed. The medical man alleges that, on the stand, he is liable to be browbeaten by ingenious and unprincipled counsel—to have his opinions misrepresented by the demanding of a degree of accuracy which is impossible—or to be entrapped into statements seemingly contradictory by artfully devised questionings; that, in fact, he is in various ways subjected to treatment which he has a right to consider unfair and illiberal. The lawyer is regarded by the medical practitioner as a species of grand inquisitor, who, although he may not have at his command the means of physical torture, by which evidence of old was extracted from an unwilling or incapable witness, has still the power to stretch the unlucky physician upon a kind of intellectual rack, which, having unhinged every joint, and fractured every bone of his mental frame, leaves the mangled carcase of his testimony as formless and misshapen as the trunk of Quasimodo released from the screws and pincers of the hangman of Paris.

Such, it cannot be denied, is the general feeling with which a medical man approaches a court of justice; his only desire and hope is to escape from it without a blunder, or the appearance of one; and he considers any subterfuge lawful by which he is freed from such an annoyance. In a word, a doctor is

apt to look upon a lawyer as his natural enemy, against whom his only defence is that of the hare against the hound, viz., flight.

Now, it may not be without interest to examine a belief so prevalent and universal; to inquire if it be founded in reality, or whether it may not be the result of misconception and misapprehension.

There are two conditions in which a medical man may find himself in a court of justice as a witness: 1st. To give his testimony as regards the facts of a medical or surgical case which has come under his knowledge; and 2dly. As an expert to give an opinion, either upon the testimony furnished by others to the court to enlighten their judgment, or to perform certain manipulations under the direction of the court, such as the making of an autopsy or a chemical analysis.

As regards the first of these cases, it will be sufficient if it be shown that the physician is no greater sufferer than any other individual who may be cited to give testimony to facts which have come under his cognizance. It is not necessary to prove that there is no hardship in being subpœnaed as a witness; it will only be requisite to show that the physician is no more liable than any other profession. We all yield a certain amount of liberty, that we may enjoy the advantages of society; we subject ourselves to law, that the lawless may be restrained. It is not pretended that perfect justice or perfect right is attained, or even attainable; all that can be done is to distribute the amount of inconvenience, and to permit immunity or privilege to no one. A court of law is the means of arriving at justice; it may be imperfect, but it is the best we can have. It is clear, however, that the ends of justice would be defeated between man and man, and the citizen and the State, if all testimony were voluntary; if a witness might or might not present himself, as inclination prompted him. To obtain this great end, therefore, the members of society have agreed that they will be bound always to appear in court, with any testimony they may have, to the exclusion of all other engagements or employments. This duty shall be peremptory. Such is the law, and undoubtedly it is a just one; and, under this law, the physician, who has any knowledge of the facts relative to any individual case, is liable to be called upon for his testimony to those, as would any other member of society to the facts of any ordinary transaction or business.

In compliance with this law, there may certainly cases arise in which the physician is subjected to a very great amount of labour, inconvenience, and even detriment to his regular business, without any return that can be called a remuneration; but he is liable to this only as is every member of the community liable. A surgeon is called to a case of injury inflicted by one individual upon another, from which death results; as a consequence, he is cited first before the coroner's jury, then before the grand jury, and finally before the supreme court. Much time is expended in these attendances, and the remuneration is next to nothing. He has not, however, any legitimate ground of complaint; his knowledge of the facts in this case was the consequence of

his profession; he felt obliged to attend when his services were originally requested, and his duty to society compels him, in like manner, to give his testimony when that is demanded. The case is undoubtedly a dead loss to him in a pecuniary point of view, but it is a loss equivalent to which every passenger by railroad, or steamboat, or in the street is liable, since he may be the unwilling spectator of an accident or murder requiring legal investigation. In the fact of his attendance in the court of justice then being compulsory, the physician has no greater cause of complaint than any other citizen. The public have a right to his testimony; that he has been placed in a situation to give this testimony is the consequence of his profession, and his liability to this annoyance, if it be an annoyance, should have been considered when he adopted it.

It may sometimes happen, it is true, that a medical man is entrapped into the examination of a case which he afterwards discovers involves a legal investigation. As, for instance, a patient has, or thinks he has, been maltreated by a practitioner whom he has employed, the case being generally one of injury, and he consults another ostensibly for the deformity, which is the result of the accident, and with the view of its possible remedy: the second surgeon soon discovers that he is summoned as a witness in a trial in which the first surgeon is defendant and the patient the plaintiff. Now, the trap in which the unfortunate surgeon has been caught was certainly not laid for him by the law. If his suspicions had been excited, it would have been perfectly justifiable for him to decline to examine the seat of the injury, or to state that he should demand a fee proportionate to the trouble, &c., which the case involved; it would be also perfectly justifiable that he should demand a fee, on the ground that his decision to the patient would decide the commencement or abandonment of a suit, as a lawyer is paid for the examination of a case, to see if an action is likely to be successful; but, having omitted to do this, he stands in the same position as the witness to any other transaction, and the law is not responsible.

Let us now examine whether on the witness stand the medical man is subjected to any worse treatment than any other witness from the other classes of society.

Now, the method which has been adopted in this country, derived from our English ancestry, is the trial by jury. As a consequence of this, the appearance of witnesses on the two sides of the case is rendered necessary, from whom the truth is elicited, or attempted to be elicited, by an examination made by the lawyer of the summoning party, and a cross-examination made in a similar manner by the opposite party, which is intended as explanatory of the first. It is quite possible that this may not be a perfect method of arriving at the truth, still it is the one adopted, and probably is liable to as few objections as any other that could be proposed to be applied in all cases; at any rate, it is the one to which all are subjected, and the medical man has no right to claim an exemption.

Now, in proportion to the seeming importance of the witness to one side, must be the severity of his cross-examination by the other, and this cross-examination will of course be directed to the detection of flaws in the testimony already given. A medical witness has no prescriptive right to expect that his dicta are to be taken on the stand merely on his own authority; his reasons must be asked, and he must be prepared to defend them; and if, as must happen in certain cases, the value of the evidence is dependent upon the capability of the witness to make an accurate observation, he must not consider it an imputation to be resented, if he be questioned not only as regards the grounds of his opinions, but also on his means or opportunities of having acquired the power of forming an opinion. Thus, if testimony were being given with regard to an accident to a limb, where from the nature of the case the diagnosis, from its acknowledged obscurity, required an accurate knowledge for its formation, questions directed towards these points could not be objected to, for, although the jury may be perfectly incapable of understanding the questions put, still, by the answers made, they can form a very good opinion of the value of the testimony given. In fact, this cross-questioning may really be considered as an advantage to the witness who is competent to testify, as it marks the difference between him and the incompetent one. It is true that this examination into the capability of a medical witness is often conducted in a manner somewhat annoying, but, perhaps, it may be well to distinguish how much of this annoyance arises from the natural disinclination, which every one feels, to have his ability to judge of any fact in his profession questioned, and then it may be found that the inquiry is conducted generally as fairly as possible. At any rate, the process is one to which all witnesses are subjected, and amounts to nothing more than asking a witness, who testifies that he has seen something at a distance, as regards the power of his vision.

Allied to this kind of cross-examination, is one of which medical men often complain, viz., where, by the ingenious statement of hypothetical cases, questions upon the evidence already given, and like devices, an attempt is made to confuse the witness, or to cause him to detract somewhat from the positive character of his previous testimony. This kind of examination all ranges itself, however, under that just alluded to, and is in fact directed towards the examination of the capabilities of the witness to form an opinion or judgment. And in truth those qualities of mind which enable one to arrive at correct judgments and opinions are precisely those which fit him to pass with credit to himself, and with usefulness to the court, through the ordeal of the cross-examination. In testimony upon all scientific subjects, apart as they are from the usual routine of the business of society, and pre-eminently so in that upon medical subjects, the jury are obliged to take the evidence upon trust, and this trust must be founded upon the character of the mind of the witness as it is elicited by his cross-examination. If, in his testimony in chief, he has been making broad and ill-defined assertions, he cannot expect that his reputation with the jury for judgment and discretion should not be

damaged if he is obliged to retract or limit them; neither can he complain if advantage be taken by counsel of such circumstances. The jury are influenced in their judgment of the medical testimony very much as the public are influenced in their opinion of medical men, viz., by their conduct and action in the general affairs of life. Thus, the jury cannot judge of medical evidence as such, but they can tell when a witness is obliged to contradict himself, or to retract from a position once taken; and such circumstances must necessarily have weight with them. Furthermore, it must be remembered that, although the lawyer has this power of cross-examination, still he is restrained by many circumstances in its use—by his necessary ignorance of the subject, for example, and more especially by his fear lest the answers may be such as to confirm the examination in chief, and thus strengthen the hands of his adversary. In fine, it may well be doubted whether any advantage would ever be obtained over a medical witness, if it were not for some error or mis-statement of his own; and any one who has watched cases involving medical testimony would not find it difficult to cite examples where, if the counsel had been a physician, he would have detected errors made by medical witnesses which have passed unnoticed.

It may appear a curious subject of inquiry, why medical men, who are in the constant habit of weighing evidence, and giving opinions on the result, should be so liable to break down when they come to be examined in a court of justice; and perhaps a solution may be found in the following considerations: A medical man, in coming to a conclusion which is to influence his action in any particular case, is seldom so fortunate as to be certain that he is clearly right; he only knows that, all things considered, he is taking the best course. In an extreme case death, without something be done, being certain, a course of treatment is adopted which is believed to be the most likely to prevent this termination: but it is evident that the foundations of this opinion need not be so strong as they ought to be, where the opinion leads, as it often does in a court of justice, directly in the opposite direction, viz. from life to death. In the one case, action might be taken on very slight grounds; in the other, nothing short of a logical certainty is satisfactory. Medically, a physician feels sure of many of his principles, this assurance amounting by no means, however, to a logical conviction; and the distinction between the two is what the medical witness oftenest overlooks, and which oversight oftenest trips him up. A medical opinion to a patient has this in it which is worthy of remark, that the course of conduct recommended should have its proper effect; it should be given with an air of a certain authority, stating all the affirmative, and somewhat overlooking the negative side. A decision of some kind is almost as important to the patient as that it should be exactly the right one; the medical man, therefore, often states confidently when in reality he has no grounds for any extreme confidence, except that the appearance of it is better for the patient. The patient is to be advantaged by the physician's confidence, the criminal should have the

advantage of his doubts; and to elicit these, which the medical witness is constantly tempted to overlook, is the object of a cross-examination. To conclude, then, this portion of these remarks, it will be seen that the medical man has no cause of complaint that he is subjected to any peculiar treatment in a court of justice; that the inconveniences which he suffers are the consequences of his position as a citizen; and that he will pass through his examination with credit to himself if he divest his mind of all unnecessary fear, and remember that the cross-questioning cannot be severe unless from his own over-confidence and mis-statement.

We arrive now at the consideration of the second portion of our inquiry—the position of the physician when present in the court of justice as an expert.

That the opinion of a physician should be asked, implies that it is of importance in the decision of the case—and so far it is a compliment to him; and if he undertakes to give it, he assuredly cannot complain if he be called upon to defend it against the cross-examination. If an engineer gives an opinion upon the construction of a light-house, or any other public work, he expects that this opinion will be canvassed and subjected to the test of examination by the party employing him; and, moreover, he expects that many groundless objections will be brought against it, and perhaps even unfair attempts made to make particular points appear weaker than the reality. This labor he voluntarily undertakes, and he must abide by the consequences. But is the position of an expert in a court of justice one which he can accept or decline as he may please? It is clear that any witness may be summoned whom counsel may say is necessary for their case; and when thus summoned, may not an opinion be elicited by questions put for the purpose? A compulsory power of this kind evidently cannot exist, and for several reasons: 1st. From the impossibility of its exercise: it would be impossible to make a witness hear the evidence in a case, and then give an opinion upon it. He may be cited on the stand, and when asked if he has heard the evidence, reply in the negative; of course, then, he will have no opinion to give. It would be still more impossible to make him do an act by which an opinion might be formed, as to examine a case, to make an autopsy, or a chemical analysis. A physician's opinion is the result of his education; his education is the result of his time and money expended in its acquirement; and an individual has no more right to extract it from him on the witness stand than in his own office. 2d. This point has not been left undecided by the law. In the English courts (1 *Carrington & Kirwan*, N. P. 23, Webb *v.* Page, ~~Marcle~~, J.) it has been ruled that the testimony of an individual cited as an expert is voluntary, and he may decline to give it, if it so seem fit to him. A decision so manifestly just would undoubtedly be maintained in this country, if at any time any physician or other scientific person cited as an expert should wish to make the trial. It results, then, that no physician, unless he choose, need give testimony as an expert; and

the remuneration which he may demand is of course to be regulated by his other and similar professional charges; and the expert may always be sure that his remuneration will be gladly and willingly paid by the party employing him, since it is often his evidence which makes the turning point of the case, and is of the chiefest importance. That physicians are often used as experts without pay cannot be denied; but it is no less true that their services in other instances often go unrewarded, even by those who should blush to permit it. This is in a degree the fault of the physicians themselves, and in a degree the consequence of circumstances too numerous to mention at the present time. My purpose will have been attained, if I have shown that the practitioner of medicine has no cause of complaint against the law or its ministers. To make himself respected, and to be successful as a witness, the physician has only to maintain that deportment and bearing of manner, and circumspection of his opinions, which would gain him credit elsewhere. And to obtain his rights—by which is meant a just remuneration for his services—he has only to understand them.

In these brief remarks, I have touched only upon the relation which the medical witness bears to the lawyer who is to question him, as the representative of the law. I have desired to show that there is no necessary antagonism between the two, and that, although the position of the one who is the questioner naturally places him in a relation somewhat annoying to the other who is the questioned, still, that this is in the line of his duty, and the annoyance is one unavoidably connected with the organization of our courts of law, as a means of arriving at truth, rather than one capable of removal. The ordeal of cross-examination is one to which all classes of witnesses are alike subjected; and it is a matter for consideration, whether the fact that physicians are so loud in their complaints of its severity and unfairness may not in a degree be attributable to their own sensitiveness to questions, even for the grounds of their opinions.

There is one other position in which a medical man may find himself placed with regard to the law—and it may not be without interest to examine the views which should influence his course of action. It may happen to any one to be called upon to treat a case in which he suspects the symptoms to be caused by poison administered previously. It is well known, for example, that cases of poisoning by arsenic are often treated as cases of cholera, or some other form of intestinal disturbance, and that certainty cannot, in fact, be arrived at unless from a *post-mortem* chemical examination of the contents of the stomach, &c. A physician connected with a case of this kind is in a somewhat unfortunate position, it is true, and has need of considerable judgment to decide upon his best course of action. If only his own case and comfort were consulted, he would maintain a discreet silence as regards his suspicions, and be careful of exciting in any degree those of others. In doing so, however, he would most assuredly be false to his duty as a citizen, which requires of all to inform of suspected crimes, under penalty, in some circum-

stances, of being considered an accomplice after the act. Duty requires the declaration. It remains, however, for consideration how it shall be done to avoid on the one hand the exciting an accusation which may prove to be groundless, and on the other, to furnish the testimony, if it shall be required, in such a manner as to make it available to the government.

Under these circumstances, the best course of the physician would seem to be to consult at once the legal officer, whose duty it will be to prosecute in the case, to state the suspicious circumstances, insisting at the same time upon the necessary uncertainty, and giving this as a reason for the unwillingness to make a direct complaint. With these premises, the legal officer would give advice upon the technical points necessary to be observed that the chain of evidence may be complete, provided it should be found necessary to test its strength: directions upon these points should be asked to be clearly given, and then should be followed so accurately that the important points may be sworn to in the court of justice. By management of this kind, which is in fact only placing the responsibility in its true place, the legal officer would strengthen the hands of the physician against any flaws which might be picked by an acute counsel in his testimony, which, arising from a perfectly excusable inadvertence, might place him in an awkward and embarrassing position. The physician who had thus cautiously felt his ground, and never advanced till he was sure of its firmness, would, when he came to the stand, win the confidence both of judge and jury, and would gain for himself there a reputation for sound sense and discretion which a similar careful proceeding always induces in other positions in life. Whereas, if, on the contrary, he should wait till he was perfectly satisfied himself before he made any mention to the legal officers, he would place himself in a false position in several ways; as, for instance, he thus virtually undertakes to vouch to the prosecuting officer that no one of those minute and technical points has been omitted in collecting the evidence, which, although without weight in the formation of his own belief, might be just the connecting link to bind the whole testimony together. In the investigation of every case of this kind, there are certain little particulars liable to be overlooked, because without influence in the formation of our own belief; and yet which may be of the utmost importance in giving that certainty to the testimony as to render it convincing to twelve jurors, which certainty the accused has a right to demand; and an oversight of this kind, thus actually defeating the ends of justice, might very much injure the reputation of a medical man. In a word, by careful proceeding under these circumstances, the physician places a responsibility, which in truth does not belong to him, upon the shoulders which should assume it, viz., those of the legal officer, and makes himself simply a witness in the case. If such a course as this had been followed in several cases to which allusion might be made, much unpleasant bickering and recrimination might have been spared.

The substance of the above has been suggested by views brought under my notice lately, both in public and private, and it has seemed to me to have a

certain amount of importance. A lawyer of some distinction, in commenting to me upon the very improved character of the medical testimony given within the last few years, regretted at the same time the jealous suspicions that often appeared to influence physicians when on the stand; and said that, having had occasion often to question medical men, he always approached it with some fear, lest his questions might betray his ignorance; and always with the knowledge that any attempt of oppression on his part could never be successful, provided the witness used a very little care and circumspection in his replies. A medical witness will, therefore, most assuredly appear the better upon the stand if he consider himself there not as a professional man set apart from the rest of society, but as about to fulfil a duty which is incumbent upon him as a citizen; and that the same conduct which gains him credit elsewhere will insure it there. I have desired to disabuse the minds of my medical brethren of what I conceive to be an error—and I believe that, if I am right, more service will be done than by a bigoted fostering of prejudices which here, as everywhere else, are the parents of much evil.